W. L. Miller Company *and* Eastern Missouri Laborers' District Council. Case 17–CA–9854(B)

March 30, 1992

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On September 30, 1991, Administrative Law Judge William L. Schmidt issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed cross-exceptions and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended supplemental Order.

ORDER

The National Labor Relations Board adopts the recommended supplemental Order of the administrative law judge and orders that the Respondent, W. L. Miller Company, Kirksville, Missouri, its officers, agents, successors, and assigns, shall pay to the individuals specified the amounts set forth in the supplemental Order.

[1] The judge was presented with a backpay formula by the General Counsel and an alternative backpay formula from the Charging Party Union. The Respondent did not propose an alternative formula. When faced with alternative backpay formulae, the judge must determine which is the ''most accurate'' method to determine backpay. *East Wind Enterprises*, 268 NLRB 655, 656 (1984). In view of the fact that the backpay theory formulated by the Union would have required the Respondent initially to discharge its then-existing work force and hire from the hiring hall, conduct the Board found to be unlawful in *Austin & Wolfe Refrigeration*, 202 NLRB 135 (1973), we find the formula accepted by the judge—i.e., that formulated by the General Counsel—to be the ''most accurate.''

Stephen E. Wamser, Esq., for the General Counsel.
Jack L. Whitacre, Esq. (Spencer, Fane, Britt & Browne), of Kansas City, Missouri, for the Respondent.
Jerald A. Hochsztein, Esq. (Feldacker & Cohen, P.C.), of St. Louis, Missouri, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. In *W. L. Miller Co.*, 284 NLRB 1180 (1987), the National Labor Relations Board (Board or NLRB) found that W. L. Miller Company (Company or Respondent) repudiated a binding collective-bargaining agreement between the Eastern Missouri Laborers' District Council (Union) and the Associated General Contractors of Missouri (AGCM)—a multiemployer association to which Respondent belonged—in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (Act). The Board entered a ''make whole'' remedial order described in more detail below.

Thereafter, the Board's Order was enforced, as modified, by the Eighth Circuit Court of Appeals, 871 F.2d 745 (8th Cir. 1989). The court's modification was designed to preclude interest on sums due the contractual trust funds for the period from the expiration of the contract at issue, April 30, 1983, until July 23, 1987, the date the Board's Order issued.

A dispute has now arisen between Respondent and the Regional Director for Region 17 concerning backpay due certain individuals. Accordingly, the Regional Director issued a compliance specification and notice of hearing on August 31, 1990.

The Respondent filed a timely answer to the compliance specification denying the liability claimed to be due and owing thereunder.

The Charging Party filed an appeal from the Regional Director's decision regarding Respondent's backpay liability with the General Counsel. That appeal was denied on December 6, 1990. The Union then filed a request for review of the General Counsel's action with the Board as permitted by the Board's Rules. On February 25, 1991, the Board granted the Union's request for review saying that it ''raised factual issues that are best resolved by an administrative law judge after a formal hearing'' and remanded the matter to the Regional Director for further action consistent with its February 25 Order.

I heard this matter on August 13, 1991, at Kirksville, Missouri. After considering the record and the posthearing briefs filed by the General Counsel, Respondent, and the Union, I now issue the following

FINDINGS OF FACT

I. THE SCOPE OF THE REMEDIAL ORDER

The Board's July 23, 1987 Order required, inter alia, that Respondent ''make its employees whole . . . for losses they may have suffered as a result of the Respondent's failure to adhere to the [Union] contract from [May 1, 1980 through April 30, 1983], with interest.''

On November 10, 1987, the General Counsel filed a motion for clarification with the Board and served a copy thereof on all parties. This motion sought to have the Board clarify its Decision and Order ''to specifically require Respondent to pay backpay to employees who would have been referred out of the Union's hiring hall if Respondent had followed the hiring hall provisions of the [applicable] collective bargaining agreement.'' Among other matters, the General Counsel called specific attention to the fact that the Union in its answering brief to Respondent's exceptions (to the administrative law judge's decision) specifically requested that the Board clarify the judge's remedial language to insure that Respondent was required to make whole ''not just Respondent's actual work force, but any other employees in the bargaining unit who have suffered a loss of pay or . . . benefits by reason of Respondent's refusal to implement [the union contract].'' Respondent filed a written opposition to the General Counsel's motion.

The Board denied that motion on July 8, 1988, for want of jurisdiction because petitions for enforcement and review had been filed in the meantime with the Eighth Circuit Court of Appeals. In so doing, the Board stated: ''Since the case is pending before the Court, Section 10(d) of the Act divests the Board of jurisdiction to *modify* its Order.'' (Emphasis added.)

However, before the Board had ruled on the motion for clarification, oral argument was presented before the Eighth Circuit on June 18, 1988, and the court thereafter issued its opinion on March 29, 1989. In its opinion, the court, noting in effect that the Board's decision in this matter had appeared to have been delayed pending the Board's *Deklewa* decision,[1] held that it would be manifestly unjust to add interest to the required union benefit fund contributions for the period from the contract termination until issuance of the Board's decision, and modified the Board's remedial order accordingly. The modification focused on the union benefit funds because, according to the court, ''[t]he parties made clear in argument that the live issue before us is not underpayment of the employees, but rather Miller's failure to make contributions to the Union's benefit fund.'' 871 F.2d at 749.

On April 19, 1989, a deputy clerk of the court, in the clerk's name, transmitted to the Board's counsel before the court a document purporting to be a copy of the court's judgment under cover of a letter which states: ''Enclosed please find copy of judgment *entered today*.'' (Emphasis added.) The purported court judgment enclosed bears no date, no court seal, and no attestation of authenticity by the court's clerk. The face of the deputy clerk's letter reflects that a copy was sent to all other parties.[2]

The General Counsel filed a second motion for clarification dated May 19, 1989. Respondent filed a written opposition; the Union filed a brief in support. In an unpublished order dated June 15, 1989, the Board granted the General Counsel's motion as follows:

> IT IS ORDERED that the General Counsel's Motion for Clarification is granted as the standard make-whole remedy encompasses any employee who would have been referred from the hiring hall pursuant to the collective-bargaining agreement in the absence of Respondent's unlawful conduct. E.g., *Wayne Electric, Inc.*, 226 NLRB 409, fn. 3 (1976).

On April 6, 1990, a court judgment issued which bears that date, the court's seal, and the clerk's attestation.

In its answer to this compliance specification, Respondent alleges that the Board's 1989 order granting the General Counsel's second motion for clarification is invalid because it was entered at a time when the petitions for enforcement and review were still pending before the court inasmuch as the court's judgment had not yet been properly entered and, hence, the Board lacked jurisdiction to act at that time.

During a prehearing conference, I sought clarification of Respondent's claim. At the time, counsel seemed to be in agreement that entry of the court's judgment in 1990—more than a year after the court's opinion—was due primarily to a clerical oversight as no dispute existed concerning the form of the court's judgment. The parties did differ, however, on its import. Respondent maintained that the delayed judgment nevertheless served to deprive the Board of jurisdiction to enter its 1989 clarification order.

Following that conference, I issued a written notice to the parties that at the outset of the hearing, argument would be heard as to why I should not recommend to the Board in this supplemental decision that it rescind its 1989 order for the same reason that the Board denied the General Counsel's original motion for clarification in 1988. The notice further provided that in the event I concluded following that argument that such a recommendation was appropriate, the General Counsel would have the burden of establishing that the compliance specification in its present form is a reasonable effectuation of the Board's 1987 Order as enforced by the 1990 court judgment.

Following argument at the hearing, I announced that I would recommend to the Board that it rescind its 1989 Order for want of jurisdiction to act on the case in any fashion while the case remained pending before the court.

Based on the April 19, 1989 letter of the deputy clerk and the Rule 36 of the Federal Rules of Appellate Procedure, the General Counsel now argues that the parties in the court proceeding were entitled to rely on the notice that judgment in the court case had been entered on April 19, 1989. For this reason the General Counsel claims that the Board in fact had jurisdiction when it entered its clarification in July 1989. I agree.

Rule 36, cited by the General Counsel, provides:

> The notation of a judgment in the docket constitutes entry of the judgment. The clerk shall prepare, sign and enter the judgment following receipt of the opinion of the court unless the opinion directs settlement of the form of the judgment, in which event the clerk shall prepare, sign and enter the judgment following final settlement by the court. If a judgment is rendered without an opinion, the clerk shall prepare, sign and enter the judgment following instructions from the court. The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment.

Based on the content of the deputy clerk's April 19, 1989 letter, Rule 36, and the fact that the court's opinion does not indicate that settlement on the form of the judgment is required, I am satisfied that the April 6, 1990 judgment is essentially a nunc pro tunc action involving form rather than substance.[3] For these reasons, I conclude that jurisdiction to act in this case effectively reverted to the Board with the deputy clerk's April 19, 1989 letter announcing that judgment had been entered on that day.

II. THE COMPLIANCE SPECIFICATION

The compliance specification is premised on the theory that the make-whole remedial order adopted by the Board

[1] *John Deklewa & Sons*, 282 NLRB 1375 (1987).

[2] This letter, appended to the General Counsel's brief, was first called to my attention with the filing of the brief. I deem it to be part of the official record in the underlying proceeding.

[3] In his brief, the General Counsel claims that the April 6, 1990 judgment was entered by the clerk sua sponte.

and enforced by the court encompasses those employees who would have been referred from the Union's hiring hall pursuant to the collective-bargaining agreement absent the Respondent's unlawful conduct.[4]

Robert A. Fetsch, the Region 17 compliance officer, conducted an investigation leading to the formulation of the compliance specification.[5] Fetsch found that during the term of the agreement, Respondent, an asphalt paving contractor, performed work on three largely overlapping projects in the Kirksville, Missouri area.

Work on one of the Kirksville projects actually commenced in 1979. With the onset of inclement weather, work on this project ceased and nine employees were laid off. Work on this project commenced again in the spring of 1980. Prior to May 1, 1980, the effective date of the collective-bargaining agreement, seven of the nine employees from the 1979 crew were recalled to work by Respondent. The two remaining employees from the 1979 crew were recalled for work shortly after May 1.

After the collective-bargaining agreement became effective, seven additional employees were employed who had not previously worked for Respondent in the area. These 16 employees (9 from the 1979 crew and 7 new employees) represented all the employees employed by Respondent within the geographic jurisdiction of the collective-bargaining agreement during its term. At any given time, Fetsch said, the Respondent's payroll records disclosed that crews ranging in size from 2 to 12 employees worked on the three projects until all of the work was completed in July 1981.

Based on this information, Fetsch said that a conclusion was made that the Respondent could have lawfully continued to employ the seven employees from the 1979 crew who were recalled prior to the effective date of the collective-bargaining agreement as well as the two other from the 1979 crew recalled to work shortly after the agreement went into effect on the ground that all these employees had a reasonable expectancy of recall. For this reason, the hours worked by these employees were excluded from the calculation of any potential backpay liability.

A further conclusion was reached, according to Fetsch, that the seven new employees hired for the first time following the effective date of the collective-bargaining agreement would have been hired from the Union's hiring hall had Respondent complied with the terms of that agreement. Hence, the hours worked by this group of employees was deemed a reasonable measure of the hours the hiring hall registrants would have worked absent Respondent's unfair labor practice.

Applying the applicable contractual pay rates, those seven employees first employed by Respondent in 1980 earned $7525.08 in the third quarter of 1980 and $11,875.94 in the fourth quarter.[6] They had no other earnings which would have been subject to the collective-bargaining agreement.

Fetsch's investigation disclosed that Laborers' Local 954 in Kirksville maintained a hiring hall during the relevant period but records reflecting the relative placement of hiring hall registrants on the out-of-work list at that time no longer existed. For this reason, Fetsch located and interviewed known registrants in an effort to identify those who may have availed themselves of the hiring hall service in 1980. In addition, Fetsch caused a series of advertisements to be placed in the local Kirksville paper seeking to identify others who had used the hiring hall service at that time. Using these methods, Fetsch was able to identify 26 individuals who were able to establish that they had utilized the Local 954 hiring hall in the third and fourth calendar quarters of 1980. Two of the 26, it was determined, were not employed in the area or the industry during the third calendar quarter.[7]

As no means existed to determine the relative order of the hiring hall registrants on the out-of-work list, the Regional Director for Region 17—the official responsible for issuing the specification—determined that for purposes of the compliance specification, the available backpay, as measured above, should be distributed equally among all available registrants. Consequently, the amended specification allocates the $313.55 to each of the 24 registrants available in the third quarter of 1980 and $456.77 to each of the 26 registrants available in the fourth quarter. In total sums, the compliance specification provides that 24 registrants are due $770.32 each and 2 are due $456.77 each.

Because the amount of backpay allocated to each registrant translates roughly to 30 hours of work in the third quarter and roughly 50 hours of work during the fourth quarter, no interim earnings offset was applied against these sums on the ground that the registrants would have likely had other earnings in each of those quarter in any event.[8]

Finally, the compliance specification makes a general request that interest be added to the amounts due the registrants thereunder. At the hearing, the General Counsel modified the interest request to conform to the interest periods provided by the court judgment for union benefit funds.[9]

III. POSITIONS OF THE PARTIES

A. *The Union*

The Union agrees with the fundamental approach taken to calculate the backpay as reflected in the compliance specification but argues that the Regional Director failed to apply the collective-bargaining agreement in determining the appropriate pool of funds available for distribution to the hiring hall registrants.

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[4] Art. III of the collective-bargaining agreement provides for an exclusive hiring hall.

[5] No one seriously disputes the facts disclosed by Fetsch's investigation. The dispute here centers around the conclusions derived from those facts.

[6] Because the Respondent's Kirksville jobs were subject to ''prevailing wage'' regulations under which the laborers' prevailing wage was the same as provided in the collective-bargaining agreement, the employees who actually worked appear to have been paid the contractual wage rate.

[7] The original compliance specification reflects that three individuals were not available in the third quarter. The compliance specification was amended at the hearing after it was learned that one of the three was in fact available.

[8] However, in accord with the policy of the General Counsel's office, all registrants were made available at the hearing for examination by any of the parties concerning interim earnings. Only one, called as a witness for other purposes, was examined on this subject. He had no interim earnings in the relevant period.

[9] As Respondent has already made the union benefit funds whole with the required interest, the compliance specification does not deal with that aspect of the remedy.

More specifically, the Union points to article III, section 2 of the agreement (R. Exh. 1, pp. 7 and 8) which provides in effect that the first man employed on a job must be registered with the local union. Thereafter, the contract provides, a contractor is permitted to man crews from sources other than the hiring hall only to the extent that the number of employees obtained from outside sources does not exceed two employees, or 25 percent of the crew, whichever is greater. The contract provides that these limitations may, in effect, be waived by agreement between the contractor and the local union business agent but, the Union points out, as Respondent unlawfully failed to apply the agreement, the limitations were never waived.

Because the compliance specification excludes the hours of outside-source employees in numbers beyond those permitted to be employed under the contract, the Union feels the pool of backpay available for distribution to the hiring hall registrants located by Fetsch is too small. The Union submitted an alternate calculation with its brief. Under that calculation, backpay would be due in the last three quarters of 1980 and the second quarter of 1981. One additional registrant would receive backpay. The Union's computation provides that one registrant is due $170.05; two are due $645.54 each; two are due $1031.48 each; and the remaining 22 registrants are due $1232.23 each. The Union does not propose any interim earnings offset.

The General Counsel argues that the Union's position would, in effect, countenance unlawful conduct. To adopt the Union's contention, the General Counsel claims, would require one to assume that when the Respondent became subject to the contract on May 1, 1980, it was obliged to lay off its then-current employees down to a number which would satisfy the ''2 or 25%'' rule and obtain new employees at the hiring hall.[10] Such action, the General Counsel contends, would contravene the holding in *Austin & Wolfe Refrigeration*, 202 NLRB 135 (1973). In that case, the Board found the employer violated Section 8(a)(3), and the union violated Section 8(b)(2), when the employer acquiesced in the union's demand that its current crew be discharged and replaced with a crew from the union's hiring hall as a condition for contracting with the employer.

Moreover, the General Counsel argues that Myrl Taylor, the union representative who negotiated the relevant collective-bargaining agreement, conceded that when a new employer became bound to the contract for the first time—as here—the contract would not require that the employer discharge or displace its current employees.[11]

The Union argues that the import of Taylor's testimony is that if an employer becomes a signatory to the contract for the first time or bound through a multiemployer group (as Respondent did), the contractor is obliged to comply with the contractual hiring procedures regardless of who was hired or when they were hired. Only if an employer was organized through NLRB procedures, the Union argues, would the employer's existing laborers be accepted.

B. *The Respondent*

Respondent asserts that: (1) the ''hiring hall remedy'' as formulated in the compliance specification is not encompassed by the court's judgment; (2) that the hiring hall involved was not operated in a nondiscriminatory fashion and hence should not be used as a basis for a remedy in this case; and (3) the ''double payment'' hiring hall remedy would be improper and manifestly unjust in view of the retroactive application of the *Deklewa* decision in this case and the scope of the earlier proceedings. For these reasons, Respondent believes the compliance specification should be dismissed in its entirety.

As to its first and third points, the Respondent contends that the literal language of the Board's remedy provided that Respondent was ''to make its employees whole.'' This language, Respondent contends, does not encompass a hiring hall remedy. The make-whole remedy was essentially provided for in the administrative law judge's original decision and no exceptions were filed as to that remedy. Not until months after the Board's decision, Respondent notes, did General Counsel and the Union become concerned for the first time about the lack of a hiring hall remedy and sought to cure that oversight with the first motion for clarification which the Board declined to entertain because it lacked jurisdiction. And, Respondent further notes, the Eighth Circuit correctly observed in its opinion that ''the live issue before us is not underpayment of employees, but rather Miller's failure to make contributions to the Union's benefit fund, and the sole issue presented involved payments into the Union's benefit fund.''[12]

With respect to its claim that the Local 954 hiring hall is not operated on a nondiscriminatory basis, Respondent refers to evidence in the original proceeding when Business Agent McNabb confronted Respondent's superintendent, Livingston, concerning the employment of his son. Specifically, Respondent cites McNabb's testimony in the original transcript at page 124 where McNabb recalled telling the elder Livingston:

> Well, under the negotiated agreement or security clause, he [the younger Livingston] hasn't reported to the union hall and I will have to ask for his dismissal.

Respondent notes that McNabb later told the elder Livingston that the contractual requirements ''wouldn't necessarily be that he couldn't work on the job.'' McNabb then went on to testify:

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[10] The General Counsel argues that all nine employees from Respondent's 1979 crew should be treated as already employed by Respondent when it became bound to the 1980–1983 contract on the ground that all had a reasonable expectancy of recall when laid off in 1979.

[11] Taylor's pertinent testimony is found at Tr. 86. It reads as follows:

> Q. Now if he [meaning a contractor] is signatory to the agreement for the first time, what happens?
>
> A. If somebody would come in organized, we would have to take his existing people in.

In preparing this decision, I listened to the official reporter's tape recording of Taylor's answer at the hearing. I am satisfied that Taylor's answer should read: ''If somebody would come in and organize, by law we would have to take his people in.'' I hereby correct the transcript to reflect this change. In doing so, I am satisfied that the integrity of the transcript is not otherwise subject to question.

[12] In fn. 7 of its brief in this proceeding, Respondent appears to request reconsideration of the retroactive application of *Deklewa* to this case. I find that issue is now resolved and cannot be reconsidered in this compliance proceeding.

> I tried to explain to him that if W. L. Miller would accept the contract as it was agreed upon and his son became a member of my local that it didn't mean he couldn't work on the project, that I was handling it as if the contract was legal and binding and it was my obligation to ask for a dismissal of anyone that refused to come to the union hall and report to me.

This evidence shows, Respondent claims, that McNabb in fact was conditioning employment on the job on union membership—either hiring union members or requiring that those who sought to ''transfer in'' to either become a union member, or register with him, before going to work.

McNabb, it was reported, has now moved to California and was not available to testify in the present hearing.

Fetsch testified that all the individuals he located who had been registered on the Union's out-of-work list at times relevant here were union members but no evidence was adduced as to when they became union members.

The General Counsel introduced the hiring hall rules of Local 954 prepared in 1979. The rules have been revised since only to reflect changes in the dues and initiation fees shown thereon. Larry Richardson, the current Local 954 business agent who originally transferred into Local 954 in 1975, testified that at the present time he maintains the out-of-work register and in 1980, McNabb maintained the register. Richardson said the Union's hiring hall is available to members and nonmembers alike.

Dale True, a member of Local 954 since 1952 and the local business agent before McNabb, testified that both members and nonmembers used the out-of-work register and that nonmembers were referred for employment. He said that if a member from another local is transferred to work in the area with his employer, such individuals must ''clear through the hall.'' True said this simply means that the worker must notify the local business agent that he is working in the area.

Basil Walker, a Local 954 member since 1972, testified about the operation of the hiring hall in 1980 and 1981. He said that there was no prohibition against nonmembers using the out-of-work list. He likewise said there was no prohibition against using the list based on gender, race, age or national origin. He recalled some nonmembers and some women used the list when he was business agent in the mid-80s.

IV. FURTHER FINDINGS AND CONCLUSIONS

I am satisfied that the approach taken by the compliance specification in this case is reasonable under the circumstances. In reaching this conclusion, I find the objections raised by the parties lack merit.

As reflected in *Wayne Electric*, cited by the Board in its clarification of the remedial order here, a make-whole order, issued in the context of a case involving an employer's refusal to abide by a collective-bargaining agreement, encompasses those employees who would have been referred but for the employer's misconduct. Consequently, it should have come as no surprise to Respondent that this approach was adopted in the compliance proceeding. The only surprise in this case is that ''the parties'' would have represented to the court during argument that the only ''live issue'' involved the union benefit funds especially where, as here, the General Counsel's original motion for clarification involving the hiring hall matter was still pending a ruling by the Board. Regardless, I am bound by the Board's subsequent clarification which, for reasons outlined above, I now find the Board had jurisdiction to issue.

I concur in the General Counsel's argument that the Union could not have lawfully required Respondent to replace the 1979 crew it had already recalled in 1980, or obviously intended to recall, when the 1980–1983 agreement went into effect. Similarly, I construe Taylor's testimony to mean that crews employed at the time any employer becomes ''organized'' are, in practice, permitted to continue working under the collective-bargaining agreement. The Union's claim in its brief that this practice is followed only where an employer is organized through NLRB election procedures reads far more into Taylor's testimony than is there. Consequently, I reject the Union's alternate backpay theory.

Nor am I satisfied that Respondent has shown that the hiring hall practices at Local 954 were discriminatory. The hiring hall rules shown to be in effect fail to support Respondent's position and the testimony in this proceeding reflect that the hiring hall operated over the years on a nondiscriminatory basis.

Respondent's conclusions from McNabb's testimony in the prior proceeding are, in my judgment, unwarranted. No testimony establishes how long the younger Livingston had been working in the area covered under the agreement and hence, whether or not he was already subject to the union-security provisions. True, McNabb alluded to Livingston becoming a ''member of my local.'' However, because Respondent's repudiation of the agreement to which it was bound precluded evidence as to how McNabb administered the agreement, it cannot now be heard to claim that McNabb was insisting by those words that the younger Livingston had to become a ''full'' union member as opposed to a ''financial core'' member.

Moreover, the hiring hall procedures specifically require that outside employees must register with the ''local union office prior to employment on the job site.'' Any suggestion that McNabb's efforts to secure compliance with this requirement is evidence of a discriminatory hiring hall is unjustified. Clearly, this provision is a justifiable aid in the administration of both the hiring hall requirements as well as the union-security provisions of the agreement.

Respondent's claim that the remedial action required under the compliance specification will result in a ''double payment'' is obviously correct. That is always the case when an employer is found to have unlawfully rejected an applicant for employment and, instead, hired another individual to actually perform the work. Respondent's claim that such an approach demonstrates that the remedial action here is manifestly unjust is simply at odds with thousands of other similar cases.

The argument by Respondent that this remedial action further demonstrates the impropriety of the retroactive application of *Deklewa* also lacks merit. As the court's opinion in this proceeding seems to make clear, Respondent would have been subject to the same remedial order under the prior conversion doctrine. For this reason, the remedial action required by this compliance specification neither adds to, nor detracts from, Respondent's already rejected claim that the retroactive application of *Deklewa* was manifestly unjust.

As no records exist which would allow the compliance officer to reconstruct the priority of the registrants on the out-of-work list, I find the equal distribution of backpay to all identifiable registrants is reasonable. Because the amounts of backpay allocated to each registrant represents but a small portion of the worktime in each calendar quarter and because of the intermittent nature of laborer's work generally, I further find that the Regional Director's refusal to adjust the gross backpay by the registrants' interim earnings is also justified.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

In accord with the calculations set forth in the compliance specification, Respondent, its officers, agents, successors, and assigns, shall pay the following sums, less appropriate Federal and state taxes, with interest for the periods provided by the court judgment in connection with the union benefit funds, to each of the following individuals:

1. Lawrence Anthony, Bernard Clark, Charles Daniels, Donald Douglas, Loren Dyer, Rodney Ferguson, Clifford James, Elbert Johnson, Charles Kessler, David Lewis, Donald Noyes, Daniel Patterman, Larry Richardson, Harvey Rufener, Burney Ruggles, Jerry Ruggles, Dale True, William Tolson, Basil Walker, Harley Walker Jr., Glen Sears, Robert Spooner, David Stockamp, and Larry Stockamp:

III. 1980	*IV. 1980*	*TOTAL BACKPAY*
$313.55	$456.77	$770.32

2. Terry Simpson and Leonard Whittum:

III. 1980	*IV. 1980*	*TOTAL BACKPAY*
0	$456.77	$456.77